

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.M., Appellant**

**and**

**U.S. BORDER PATROL, Artesia, NM, Employer**

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**Docket No. 07-2043  
Issued: February 13, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 30, 2007 appellant filed a timely appeal from the July 3, 2007 merit decision of the Office of Workers' Compensation Programs which found that she received a \$6,224.89 overpayment of compensation and that the overpayment was not subject to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these overpayment issues.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation; (2) if so, whether the Office properly determined that the amount of the overpayment was \$6,224.89; and (3) whether the Office properly determined that appellant was not at fault in the creation of the overpayment of compensation but that the overpayment was not subject to waiver.

**FACTUAL HISTORY**

On October 3, 2006 appellant, then a 25-year-old border patrol trainee, fell off a rope on a training course and dislocated her left elbow. On December 28, 2006 the Office accepted her claim for closed posterior and lateral dislocation of left elbow.

In a December 7, 2006 note, Dr. Howard Black, an orthopedic surgeon, stated that appellant was able to return to light duty but that she was told by her employer that a light-duty spot was not available at the time.

In a January 3, 2007 telephone memorandum, the Office noted that appellant was on leave without pay since November 26, 2006 as the employing establishment did not have light duty available so she could not return to work. On January 8, 2007 the Office requested additional information from Dr. Black regarding her disability. In a January 5, 2007 note, Dr. Black stated that appellant was allowed to return to full activity including physical fitness training at the academy. A January 16, 2007 Office telephone memorandum noted that appellant was being paid on the periodic rolls and that she was released to return to work full time effective January 5, 2007. The memorandum also noted appellant's statements that the employing establishment was aware of her release but had not determined whether she would be assigned to an administrative position or reassigned to the academy.

In a January 15, 2007 work capacity evaluation, Dr. Black noted that appellant was capable of performing her usual job.

On February 21, 2007 appellant advised the Office that she was released to return to work but the employing establishment did not have work to accommodate her.

In an April 17, 2007 memorandum to the Director, the Office stated that appellant had received an overpayment of compensation because she was released to full duty on January 5, 2007 and was paid compensation for total disability through April 14, 2007. The Office noted that she has previously been placed on the periodic rolls effective December 24, 2006. In the memorandum, the Office determined that appellant was without fault in the matter of the overpayment.

In an April 18, 2007 preliminary determination decision, the Office determined that appellant received an overpayment of \$6,288.93 because she was released to full duty on January 5, 2007 yet continued to receive compensation for disability through April 14, 2007 and was without fault in creating the overpayment.

On May 10, 2007 appellant informed the Office that she returned to work on April 4, 2007 and that she could not return to the academy when she was released to work in January as she had to wait for another class.

On May 13, 2007 appellant requested that the Office make a decision based on the written evidence and requested a waiver arguing that she had been told several times that she would be paid until she went back to work regardless of being cleared by the doctor.

On July 3, 2007 the Office issued a formal decision denying appellant's request for a waiver on the grounds that, although she was without fault, she did not qualify for a waiver. The Office stated that there was an overpayment of compensation in the amount of \$6,288.93 which occurred because appellant was released to full duty on January 5, 2007 and continued to receive compensation for total disability through April 14, 2007.

## LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>1</sup>

The Office procedure manual<sup>2</sup> identifies various situations when overpayments of compensation may occur:

- a. *A claimant returns to work* and continues to receive compensation.
- b. *A widow or widower under age 55 remarries* without advising [the Office] and compensation continues.
- c. *A schedule award expires*, but compensation continues to be paid.
- d. *A claimant is determined to be not entitled* to compensation already paid.
- e. *Adjustments are made to rate of pay*; cost-of-living increases are applied in error;
- f. *Compensation is forfeited* for failing to report earnings as required; etc.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>3</sup> If it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

Office procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls.<sup>5</sup> The Board has held that the Office must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. § 8102(a).

<sup>2</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

<sup>3</sup> *Paul L. Steward*, 54 ECAB 824 (2003).

<sup>4</sup> *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (a) (March 1997).

<sup>6</sup> *Winton A. Miller*, 52 ECAB 405 (2001).

### **ANALYSIS -- ISSUE 1**

Before the Board can determine whether the Office properly refused to waive an alleged overpayment, the Board must first determine whether an overpayment actually occurred.<sup>7</sup>

The Office's finding of overpayment was premised on the conclusion that appellant was released to work and therefore no longer entitled to compensation as of January 5, 2007. Since she was being paid compensation on the periodic rolls, it was the Office's burden of proof to terminate compensation, in a final decision, as of the date she was no longer disabled. Furthermore, as appellant was paid on the periodic rolls, she was entitled to a pretermination notice prior to a final decision terminating compensation benefits. In the present case, the Office merely determined retroactively that she was not entitled to compensation, without issuing a pretermination notice or final decision terminating compensation.

In the July 3, 2007 decision, the Office stated that an overpayment occurred when appellant was released to full duty on January 5, 2007 but continued to be paid through April 14, 2007. On January 5, 2007 she was released to full duty by her physician. Appellant informed her employer of her release to work. However she was informed by the employing establishment that a position was not available at that time. Despite being physically capable of returning to work on January 5, 2007 appellant was not allowed to return to work because the employer reassigned appellant to the academy, instead of offering her an administrative position.

The Board finds that the Office did not properly assess the fact and amount of overpayment. As appellant did return to work on April 4, 2007, she was not entitled to receipt of compensation after that date. The only overpayment established in the record was for the time period in which appellant had returned to work but was still being paid on the periodic rolls, from April 4 through 14, 2007.

### **CONCLUSION**

The Board finds that the case is not in posture for a decision regarding the amount of overpayment. The case will be remanded to the Office for the issuance of an appropriate decision.

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<sup>7</sup> Robert L. Curry, 53 ECAB 656 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 3, 2007 decision of the Office of Workers' Compensation Programs is set aside and remanded to the Office for further proceedings consistent with this decision.

Issued: February 13, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board